(2)

Supreme Court, U.S.
FILED
MAR
FEB 28 1996
CLERK

No. 95-1372

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GRADY and LILLIE AUVIL, ROBERT and CHARLOTTE BRODY, BURT and ELLY CHESTNUT, BERT and EVELYN STENNES d/b/a SQUAW CREEK RANCH, INC.,
Petitioners,

v.

CBS "60 MINUTES", a foreign corporation, and COLUMBIA BROADCASTING SYSTEM (CBS), a foreign corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

BRUCE E. H. JOHNSON *
P. CAMERON DEVORE
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 628-7683

SUSANNA M. LOWY
ANTHONY M. BONGIORNO
CBS Inc.
51 West 52nd Street
New York, New York 10019
(212) 975-8758
Counsel for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

40 pp

RULE 29.6 DISCLOSURE

Respondent CBS Inc., sued herein as CBS "60 MINUTES" and Columbia Broadcasting System (CBS), is owned by Westinghouse CBS Holding Co., Inc., which is owned by Westinghouse Electric Corporation. CBS Inc. has two nonwholly owned subsidiaries: CBS/Group W Television Sales Inc. and Station B Holdings Inc.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Introduction	1
B. The Regulatory History of Alar Before the February 1989 60 MINUTES Report	1
C. The 60 MINUTES Broadcast	6
D. The Regulatory History of Alar Following the 60 MINUTES Report	8
E. A Comparison of NRDC and EPA Risk Assessments	9
F. The Procedural History of the Lawsuit	11
REASONS FOR DENYING THE WRIT	15
I. BECAUSE PETITIONERS DID NOT PRESS THEIR OBJECTION TO CBS' SCIENTIFIC EVIDENCE IN THE COURT OF APPEALS AND THAT COURT NEVER PASSED UPON THAT ISSUE, THIS IS NOT AN APPROPRIATE CASE FOR CLARIFYING *DAUBERT v. MERRELL DOW PHARMACEUTICALS*	15
II. THE NINTH CIRCUIT DID NOT COMMIT ANY PROCEDURAL ERROR BY AFFIRMING SUMMARY JUDGMENT ON A GROUND THAT WAS SUPPORTED IN THE RECORD AND HAD BEEN ARGUED BY CBS, BUT ON WHICH PETITIONERS APPARENTLY HAD NOT FOCUSED THEIR ATTENTION	21

TABLE OF CONTENTS—Continued

Page

III. THE DECISION BELOW DID NOT DECIDE ANY FIRST AMENDMENT QUESTION RELATING TO "LITERALLY TRUE STATEMENTS WITH DEFAMATORY IMPLICATIONS" AND, MOREOVER, WAS A STATE LAW RULING THAT DOES NOT CONFLICT WITH ANY FEDERAL APPELLATE DECISION 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES — Page

AIDS Counseling and Testing Centers v. Group W Television, Inc., 903 F.2d 1000 (4th Cir. 1990) .. 29
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 21
Auvil v. CBS "60 Minutes", 67 F.3d 816 (9th Cir. 1995) 13, 14, 17, 24, 28
Auvil v. CBS "60 Minutes", 800 F. Supp. 928 (E.D. Wash. 1992) 6, 11
Auvil v. CBS "60 Minutes", 800 F. Supp. 941 (E.D. Wash. 1992) 11, 26
Auvil v. CBS "60 Minutes", 836 F. Supp. 740 (E.D. Wash. 1993) 13, 16, 27, 30
Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983) .. 17
Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 82 S.E.2d 588 (1954) 29
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 22, 23
Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993) 28, 29
Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) 12, 13, 15, 16, 17, 18
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 27
Environmental Def. Fund, Inc. v. EPA, 548 F.2d 998 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 925 (1977) 20
Exner v. American Medical Ass'n, 12 Wash. App. 215, 529 P.2d 863 (1974) 27
Garrison v. Louisiana, 379 U.S. 64 (1965) 29
Haring v. Prosise, 462 U.S. 306 (1963) 28
Herron v. KING Broadcasting Co., 112 Wash. 2d 762, 776 P.2d 98 (1989) 26
Int'l Fabricare Inst. v. United States EPA, 972 F.2d 384 (D.C. Cir. 1992) 20
Janklow v. Newsweek, Inc., 759 F.2d 644 (8th Cir. 1985), *reheard on other grounds*, 788 F.2d 1300 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986) 29
Jones v. Unisys Corp., 54 F.3d 624 (10th Cir. 1995) 22

TABLE OF AUTHORITIES—Continued

Page

Lee v. The Columbian, Inc., 64 Wash. App. 534, 826 P.2d 217 (1991) 27
Mark v. Seattle Times Co., 96 Wash. 2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982) 26, 27
Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 21
McBride v. Merrell Dow and Pharmaceuticals, Inc., 800 F.2d 1208 (D.C. Cir. 1986) 17, 24, 25
McKenzie v. General Tel. Co. of California, 41 F.3d 1310 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1697 (1995) 22
Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) .. 29, 30
Mitchell v. Collagen Corp., 67 F.3d 1268 (7th Cir. 1995) 22
Nader v. United States EPA, 859 F.2d 747 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989) 8
Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 30
Richardson v. Richardson-Merrell, Inc., 649 F. Supp. 799 (D.D.C. 1986), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989) 20
Schley v. Pullman's Palace Car Co., 120 U.S. 575 (1887) 16
Sims v. KIRO, Inc., 20 Wash. App. 229, 580 P.2d 642, *rev. denied*, 91 Wash. 2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979) 27
Stevens v. Department of Treasury, 500 U.S. 1 (1991) 17
T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626 (9th Cir. 1987) 21
Taskett v. KING Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976) 28
United States v. Abel, 469 U.S. 45 (1984) 18
Villari v. Terminix Intern., Inc., 692 F. Supp. 568 (E.D. Pa. 1988) 20
Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) 14

TABLE OF AUTHORITIES—Continued

Page

White v. Fraternal Order of Police, 909 F.2d 512 (D.C. Cir. 1990) 28
Youakim v. Miller, 425 U.S. 231 (1976) 27

STATUTES

7 U.S.C. § 136(bb) 6
7 U.S.C. § 136d(b) 6
7 U.S.C. § 136w(d) 3
7 U.S.C. §§ 136-136y 3
15 U.S.C. §§ 2601-29 ..... 6, 18
15 U.S.C. § 2603(f) 6
21 U.S.C. § 348(c)(3)(A) 18

RULES

Supreme Court Rule 10.1 ..... 15, 17
Federal Rule of Civil Procedure 56 ..... 21, 22, 23

REGULATIONS

40 C.F.R. § 154.7(a)(2)(i) 18
40 C.F.R. §§ 158.153, 158.155 2
37 Fed. Reg. 13,369 (1972) 27
48 Fed. Reg. 46,234 (1983) 27
54 Fed. Reg. 22,558 (1989) 8
57 Fed. Reg. 46,436 (1992) ..... *passim*
Chemical Carcinogens: Review of the Science and Its Associated Principles, 50 Fed. Reg. 10,372 (1985) (Office of Science and Technology Policy, Exec. Office of the President) 20
EPA Final Guidelines for Carcinogen Risk Assessment, 51 Fed. Reg. 33,992 (1986) 20
Final Guidelines for Developmental Toxicity Risk Assessment, 56 Fed. Reg. 63,798 (1991) 18

MISCELLANEOUS

Cal. Env. Prot. Agency, *Risk Specific Intake Level for Proposition 65 Carcinogen 1,1-Dimethylhydrazine (UDMH)* (1992) 26
E. Crouch & R. Wilson, *Interspecies Comparison of Carcinogenic Potency*, 5 J. Toxicology & Envtl. Health 1095 (1979) 19
M. Curtis, *Monkey Trials: Science, Defamation, and the Suppression of Dissent*, 4 Wm. & Mary Bill of Rights J. 507 (1995) 21

TABLE OF AUTHORITIES—Continued

Page

Reto Engler, EPA Memo "List of Chemicals Evaluated for Carcinogenic Potential" (Oct. 14, 1992) .. 9, 26

Environmental Protection Agency, *Daminozide Special Review Technical Support Document—Preliminary Determination to Cancel the Food Uses of Daminozide* (May 1989) 8, 9, 10

Environmental Protection Agency, *Draft Daminozide Special Review Position Document 2/3/4* (Sept. 12, 1985) 3

Environmental Protection Agency, *Peer Review of Daminozide (Alar) and UDMH (Unsymmetrical 1,1-dimethylhydrazine)* (undated) 4

Environmental Protection Agency, *Second Peer Review of Daminozide (Alar) and UDMH (Unsymmetrical 1,1-dimethylhydrazine)* (May 1989) 3, 6

Environmental Protection Agency, *Third Peer Review of Daminozide and its Metabolite/Breakdown Product 1,1-Dimethylhydrazine* (July 26, 1991) 2

A. Finkel, *Towards Less Overconfident Comparisons of Uncertain Risks: The Case of Aflatoxin and Alar* (May 1993 Draft) 26

Food Safety Issues: Hearing Before the Subcomm. on Dept. Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture, 101st Cong., 1st Sess. (1989) 6

L.S. Gold et al., *Rodent Carcinogens: Setting Priorities*, 258 Science 261 (1992) 19, 26

D. Goodman, *Review of Blood Vessel Neoplasms and Neoplasms of Lung, Kidney, and Liver in Swiss Mice Administered 1,1-Dimethylhydrazine in Drinking Water* (Aug. 1985) 4

Government Regulation of Pesticides in Food: The Need for Administrative and Regulatory Reform, Report by the Subcomm. on Toxic Substances, Environmental Oversight, Research and Development to the Senate Comm. on Environment and Public Works, S. Rep. No. 55, 101st Cong., 1st Sess. (1989) 3

TABLE OF AUTHORITIES—Continued

Page

H. Guess et al., *Uncertainty Estimates for Low-Dose-Rate Extrapolations of Animal Carcinogenicity Data*, 37 Cancer Res. 3475 (1977) 19

C. Haun et al., *Chronic Inhalation Toxicity of Unsymmetrical Dimethylhydrazine: Oncogenic Effects* (Oct. 1984) 3, 8

Health Effects of Pesticide Use On Children: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor & Human Resources, 101st Cong., 1st Sess. (1989) 19

International Agency for Research of Cancer, *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans* (7th Supp. 1987) 18

S. Jasanoff, *EPA's Regulation of Daminozide: Unscrambling the Messages of Risk*, 12 Sci. Tech. & Hum. Values 116 (1987) 4

D. Lester, *Wash. Apple Commission Advises to Halt Use of Alar Until Proven Safe*, The Packer, July 19, 1986 5

National Cancer Institute, *Bioassay of Daminozide for Possible Carcinogenicity*, National Cancer Institute Carcinogenesis Technical Report No. 83 (1978) 2, 8

National Research Council, *Issues in Risk Assessment* (1993) 18, 20

National Research Council, *Pesticides in the Diets of Infants and Children* (1993) 6, 10

National Research Council, *Regulating Pesticides in Food: The Delaney Paradox* (1987) 9, 26

National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (1983) 19

Natural Resources Defense Council, *Intolerable Risk: Pesticides in our Children's Food* (1989) ..7, 9, 10

D. Patton, *The ABCs of Risk Assessment*, 19 E.P.A. J. 10 (1993) 21

F. Perea and P. Boffeta, *Perspectives on Comparing Risks of Environmental Carcinogens*, 80 J. Nat'l Cancer Inst. 1282 (1988) 19

TABLE OF AUTHORITIES—Continued

Page

Response to Dr. Wilkinson's March 27, 1986 Comments on the N.Y. State Dept. of Health's "Qualitative Assessment of the Carcinogenicity of Daminozide and UDMH in Rodents" 4, 19

L. Roberts, *Alar: The Numbers Game,* 243 Science 1430 (1989) 10

B. Sedgwick, *Oxidation of Methylhydrazines to Mutagenic Methylating Derivatives and Inducers of the Adaptive Response of E. coli to Alkylation Damage,* 52 Cancer Res. 3693 (1992) 19

Statement by the U.S. Environmental Protection Agency on Alar (Feb. 25, 1992) 9

L. Tollefson et al., *Comparison of the Cancer Risk of Methylene Chloride Predicted from Animal Bioassay Data with the Epidemiologic Evid.,* 10 Risk Analysis 429 (1990) 19

B. Toth, *1,1-Dimethylhydrazine (Unsymmetrical) Carcinogenesis in Mice: Light Microscopic and Ultrastructural Studies on Neoplastic Blood Vessels,* 50 J. Nat'l Cancer Inst. 181 (1973) 2, 8

B. Toth et al., *Introduction of Tumors in Mice with the Herbicide Succinic Acid 2,2-Dimethylhydrazide,* 37 Cancer Res. 3497 (1977) 2, 8

B. Toth et al., *The Large Bowel Carcinogenic Effects of Hydrazines and Related Compounds,* 40 Cancer Res. 2427 (1977) 2, 8

L. Zeise et al., *Alar in Fruit: Limited Regulatory Action in the Face of Uncertain Risks, in Analysis Comm'n & Perception Risk* 275 (B.J. Garrick and W.C. Gekler eds. 1991) 2

STATEMENT OF THE CASE

A. *Introduction* [1]

In February 1989, respondent CBS Inc. ("CBS")[2] reported on 60 MINUTES that "Alar," a chemical sprayed on apples, had been found by the Environmental Protection Agency ("EPA") and the Natural Resources Defense Council ("NRDC") to be a potent carcinogen especially dangerous to children, and that Alar nevertheless remained on the market. Claiming damages as a result of the broadcast, eleven Washington State apple growers [3] filed suit against CBS. The District Court dismissed their case because petitioners failed to offer any evidence establishing Alar's safety and were also unable to prove that Alar does *not* cause cancer or that children were *not* at greater risk from exposure to Alar. The Court of Appeals affirmed, holding that petitioners had failed to meet their burden of proof under Washington law.

B. *The Regulatory History of Alar Before the February 1989 60 MINUTES Report*

Daminozide, known by its trade name "Alar," is a chemical pesticide that was applied to a variety of fruits and vegetables in this country from the late-1960s until 1989. 57 Fed. Reg. 46,436, 46,436 (1992). In 1989, Uniroyal Chemical Company ("Uniroyal"), Alar's manufacturer, voluntarily requested the cancellation of its registration for all food uses. *Id.* Alar cannot be visually observed, nor washed or easily removed from food. *Id.*

---

[1] In this Brief, references to "CR" refer to the clerk's record as filed in the District Court. Citations in this Brief to appellants' or appellee's briefs refer to the briefs filed in the Court of Appeals.

[2] CBS is the respondent herein, having been named a defendant under the designations CBS "60 MINUTES" and Columbia Broadcasting System.

[3] The four remaining plaintiffs and their spouses are petitioners Grady and Lillie Auvil, Robert and Charlotte Brody, Burt and Elly Chestnut, and Bert and Evelyn Stennes d/b/a Squaw Creek Ranch, Inc.

During the sixteen years preceding the CBS broadcast, scientists had repeatedly uncovered evidence of the carcinogenicity of daminozide and of UDMH, a metabolite and breakdown product of daminozide.[4]

In 1973, Dr. Bela Toth published a study concluding that UDMH caused cancer in mice.[5] Studies in 1977[6] and 1978[7] confirmed that daminozide caused cancer in mice. In 1980, the EPA reviewed daminozide's registration and noted that "[b]oth [the Toth and National Cancer Institute ("NCI")] studies showed daminozide to be a carcinogen in mice."[8] The Agency, however, cancelled this review after discussions with Uniroyal.[9]

---

[4] The broadcast discussed both of these components of the pesticide. This is inevitable, because daminozide contains UDMH as a contaminant and breakdown product. 57 Fed. Reg. 46,436, 46,437 (1992); CR 165, Ex. E, Rosen Dep. Ex. 145 (EPA, *Third Peer Review of Daminozide and its Metabolite/Breakdown Product 1,1 Dimethylhydrazine* 1 (July 26, 1991)) ("*Third Peer Review*") (UDMH is metabolite/breakdown product). When the EPA registers chemicals, it considers parent compounds as well as breakdown products. 40 C.F.R. §§ 158.153, 158.155.

[5] CR 165, Ex. E. Rosen Dep. Ex. 137 (B. Toth, *1,1-Dimethylhydrazine (Unsymmetrical) Carcinogenesis in Mice: Light Microscopic and Ultra-structural Studies on Neoplastic Blood Vessels*, 50 J. Nat'l Cancer Inst. 181 (1973)).

[6] CR 165, Ex. E, Rosen Dep. Ex. 138 (B. Toth et al., *Introduction of Tumors in Mice with the Herbicide Succinic Acid 2,2-Dimethylhydrazide*, 37 Cancer Res. 3497 (1977)), Ex. 139 (B. Toth et al., *The Large Bowel Carcinogenic Effects of Hydrazines and Related Compounds*, 40 Cancer Res. 2427 (1977)).

[7] CR 165, Ex. N (National Cancer Institute, *Bioassay of Daminozide for Possible Carcinogenicity*, National Cancer Institute Carcinogenesis Technical Report No. 83 (1978)).

[8] CR 165, Ex. BB (Letter from Marcia Williams, Director, EPA Special Pesticide Review Division, to Aceto Chemical Co. (Oct. 27, 1980)).

[9] CR 165, Ex. B, Slovic Dep. Ex. 22 (L. Zeise et al., *Alar in Fruit: Limited Regulatory Action in the Face of Uncertain Risks, in Analysis Comm'n & Perception Risk* 275, 277 (B.J. Garrick and W.C. Gekler eds. 1991)).

In 1984, EPA began the review process again.[10] In August 1985, an Agency peer-review committee reviewed all available toxicological data on daminozide and UDMH and reached the conclusion that both were class B_2, "probable human," carcinogens.[11] EPA then drafted a Daminozide Special Review Position Document 2/3/4 ("PD 2/3/4") for submission to a Scientific Advisory Panel in accordance with the procedures required by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y.[12] This position document reflected an unusually high degree of EPA concern.[13] In PD 2/3/4, the Agency identified both daminozide and UDMH as probable human carcinogens because of tumor incidence in multiple species of experimental animals.[14]

In 1985, a scientific advisory panel ("SAP") criticized EPA's position, claiming the animal cancer data relied on by the Agency in the PD 2/3/4 were insufficient to support a quantitative risk assessment.[15] The SAP criti-

---

[10] Data available at that time indicated that daminozide was carcinogenic in laboratory mice and rats. 57 Fed. Reg. 46,436, 46,437 (1992). EPA was specifically concerned about risk from UDMH, "a known carcinogen in laboratory animals." *Id. See also* CR 165, Ex. DD (C. Haun et al., *Chronic Inhalation Toxicity of Unsymmetrical Dimethylhydrazine: Oncogenic Effects* (Oct. 1984)).

[11] CR 165, Ex. H, Farber Dep. Ex. 215 (EPA, *Second Peer Review of Daminozide (Alar) and UDMH (Unsymmetrical 1,1-dimethylhydrazine)* 2-3 (May 1989)) ("*Second Peer Review*").

[12] 57 Fed. Reg. 46,436, 46,437 (1992). According to 7 U.S.C. § 136w(d), EPA is required to submit proposed actions to a "scientific advisory panel" for comment.

[13] The PD 2/3/4 would have allowed EPA to propose and finalize its regulatory action in one step. The usual practice is to complete the process in two steps: a PD 2/3, which proposes a regulatory action, and a PD 4, which finalizes the action. 57 Fed. Reg. 46,436, 46,437 (1992).

[14] CR 165, Ex. T (EPA, *Draft Daminozide Special Review Position Document 2/3/4* II-29-30 (Sept. 12, 1985)).

[15] The SAP itself was later sharply criticized by a Senate Subcommittee. *See* CR 165, Ex. EE (*Government Regulation of Pesticides in Food: The Need for Administrative and Regulatory*

cized some aspects of the Toth studies and requested additional data.[16] EPA had previously noted these concerns,[17] and an independent review performed at EPA's request validated the basic conclusions of the first Toth study.[18]

Following an additional evaluation of the various cancer studies in August 1985, moreover, an EPA Peer Review Committee noted

> that both Alar and UDMH produced significant increases in oncogenic responses at multiple tissue sites in different experiments in multiple species and strains of animals.[19]

Reform, Report by the Subcomm. on Toxic Substances, Environmental Oversight, Research and Development to the Senate Comm. on Environment and Public Works, S. Rep. No. 55, 101st Cong., 1st Sess. 36, 61-62 (1989)); CR 165, Ex. B., Slovic Dep. Ex. 36 (S. Jasanoff, *EPA's Regulation of Daminozide: Unscrambling the Messages of Risk*, 12 Sci. Tech. & Hum. Values 116, 118-20 (1987)).

[16] 57 Fed. Reg. 46,436, 46,437 (1992); CR 165, Ex. E, Rosen Dep. Ex. 147 (EPA Mem. from William Pepelko through William Farland, Director Carcinogen Assessment Group, to Eileen Claussen, Director Characterization and Assessment Division at 1 (Jan. 9, 1987)) (*"Pepelko Memorandum"*).

[17] *See* CR 165, Ex. C., Wilkinson Dep. Ex. 62 (Transcript of Proceedings: EPA, Scientific Advisory Panel at 2). Similar arguments by petitioners' expert, Dr. Christopher F. Wilkinson, were rejected by the New York State Department of Health in 1986. *See* CR 165, Ex. CC (*Resp. to Dr. Wilkinson's March 27, 1986 Comments on the N.Y. State Dept. of Health's "Qualitative Assessment of the Carcinogenicity of Daminozide and UDMH in Rodents"*) (*"New York Response"*).

[18] CR 165, Ex. E, Rosen Dep. Ex. 144 (D. Goodman, *Review of Blood Vessel Neoplasms and Neoplasms of Lung, Kidney, and Liver in Swiss Mice Administered 1,1-Dimethylhydrazine in Drinking Water* (Aug. 1985)).

[19] CR 165, Ex. S (EPA, *Peer Review of Daminozide (Alar) and UDMH (Unsymmetrical 1,1-Dimethylhydrazine)* 8 (undated)) (*"Peer Review"*). The Committee also noted that sufficient experimental data established that "[b]oth Alar and UDMH produce identical tumor types at the same organ sites," that "[t]he principal types of tumors . . . produced by oral administration of Alar to Swiss mice have also been observed following the oral administration of other structurally-related hydrazine compounds to Swiss

The Peer Review Committee agreed with the Agency's conclusion that both Alar and UDMH were "B2 category" carcinogens—*i.e.*, probable human carcinogens.[20]

In 1987, as public concern was mounting,[21] EPA's Carcinogen Assessment Group conducted yet another review of UDMH data, again stating that

> the evidence is more than adequate to classify [UDMH] as a carcinogen in animal test systems and a B2 chemical using EPA's weight-of-evidence classification system.[22]

In January 1989, the Agency estimated, based on interim results of Uniroyal's own animal bioassay studies, that the dietary risk to the general population from daminozide/UDMH was 4.9×10^{-5}, or 5 incidents of cancer in a group of 100,000 people—which was 50 times the acceptable risk.[23] 57 Fed. Reg. 46,436, 46,437

---

mice," that the Alar breakdown product and metabolite "UDMH is mutagenic *in vitro*," and that UDMH "is present as a residue on Alar-treated foodstuffs that are consumed by humans." *Id.* at 7-8.

[20] *Id.*

[21] In 1986, for example, the American Academy of Pediatrics, concerned about the effects of Alar on children, requested that the Agency suspend the use of the chemical. *See* CR 165, Ex. F, Olson Dep. Ex. 168 (Letter from Dr. Martin Smith to EPA (May 8, 1986)); CR 165, Ex. C, Wilkinson Dep. Ex. 72 (Letter from Dr. Richard Jackson to "fellow pediatricians" (May 2, 1986)). Meanwhile, major grocery chains joined Ralph Nader's boycott of apple products and the Washington Apple Commission advised growers to avoid Alar. CR 165, Ex. C, Wilkinson Dep. Ex. 57 (D. Lester, *Wash. Apple Commission Advises to Halt Use of Alar Until Proven Safe*, The Packer, July 19, 1986)).

[22] *Pepelko Memorandum*, at 2.

[23] Risk assessors, like the EPA, use mathematical expressions to state risk estimates, which are derived by combining potency figures with exposure data. For example, a cancer risk of 5×10^{-5} is mathematical shorthand for a risk estimated to cause cancer in 5 people out of 100,000. The EPA considers any risk higher than 1 out of one million (1×10^{-6}) to be an unacceptable risk. CR 165,

(1992). On February 1, 1989, the Agency announced it had found an "inescapable and direct correlation between exposure to UDMH and the development of life-threatening tumors in test mice." [24] The EPA Peer Review Committee met and reaffirmed its conclusion that both Alar and UDMH were probable human carcinogens.[25] As the EPA's Assistant Administrator Dr. Jack Moore told Congress, EPA's evidence "was suitable for a decision to say that indeed [Alar] was a carcinogen . . . ." *Food Safety*, at 24.

C. *The 60 MINUTES Broadcast*

On February 26, 1989, CBS broadcast the 60 MINUTES report entitled " 'A' is for Apple," [26] which addressed a range of topics, including the alleged failure of the EPA and the Food and Drug Administration to adequately regulate carcinogenic pesticides used on agricultural products, and the unreasonable amount of time the agencies may take to limit exposure from hazardous pesticides.[27] The broadcast noted that pesticides on fruit

---

Ex. Y (*Food Safety Issues: Hearing Before the Subcomm. on Dept. Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 101st Cong., 1st Sess. 57 (1989)) ("*Food Safety*"); CR 165, Ex. L, Pendergrass Dep. Ex. 235 (National Research Council ("NRC"), *Pesticides in the Diets of Infants and Children* 129 (1993)) ("*Pesticides*").

[24] CR 165, Ex. C, Wilkinson Dep. Ex. 87 (EPA Press Release dated Feb. 1, 1989).

[25] EPA, *Second Peer Review*, at 12.

[26] A transcript of the 60 MINUTES broadcast is attached as an appendix to the District Court's decision in *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 938-41 (E.D. Wash. 1992) ("*Auvil I*"); *see also* Petition for Certiorari ("Pet.") at 45a-55a.

[27] FIFRA allows EPA to cancel registration of any pesticide that causes an "unreasonable risk to man." 7 U.S.C. § 136(bb); 136d(b). The Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-29, requires EPA to take action upon receipt of information that indicates "that there may be a reasonable basis to conclude" that a chemical presents a significant risk of harm to humans from cancer. 15 U.S.C. § 2603(f).

posed a particular risk to children because children consume more fruit per unit of body weight than adults, yet in calculating dietary risk from agricultural pesticides EPA did not appropriately account for children's increased lifetime risk. The CBS broadcast discussed daminozide—along with its breakdown product and contaminant, UDMH—and benomyl, a chemical pesticide used on bananas.

The CBS broadcast included risk assessments about the increased incidence of possible cancer cases attributable to exposure to daminozide—predictions that were based upon EPA data and the NRDC's 1989 report entitled *Intolerable Risk: Pesticides in our Children's Food* (*"Intolerable Risk"*) (CR 165, Ex. B, Slovic Dep. Ex. 23), which studied 23 pesticides used in the nation's food supply. CBS also reported the opinion of some scientists that Alar was the "most potent" carcinogen in the nation's food supply. The broadcast commented that children were most at risk, because they consume more fruits and juices than adults.[28] It also quoted Uniroyal, which asserted that ". . . any risk from daminozide or UDMH, if it exists, is negligible." [29]

---

[28] Dr. John Graef, a professor of pediatrics at Harvard, was interviewed during the broadcast and commented that he "quibbled" with some of the NRDC's calculations, but that "by and large, the basis of the [NRDC] report is sound . . . . [C]hildren clearly are subject to very large exposures to these chemicals . . . [and] are at greater risk than [are] adults." Dr. Moore, then assistant administrator of the EPA, also disagreed with NRDC's estimate of the magnitude of the risk. Yet he acknowledged that the EPA was not "debating whether or not there's a problem here. What we're debating is the pace by which one should get it off the market. We have concluded that it's a problem, [and] it should come off the market."

[29] In addition, Dr. Moore stated that EPA believed the "magnitude of the risk" was less than NRDC estimated and that the data were not "sufficiently provocative" to justify immediate cancellation of Alar's registration. Dr. Graef also disagreed with the NRDC's calculations.

D. *The Regulatory History of Alar Following the 60 MINUTES Report*

In May 1989, EPA again moved the Alar cancellation process forward by issuing a position document, PD 2/3, which reflected interim data from Uniroyal's animal studies. The Agency stated:

> Considered with the results of the earlier oncogenicity studies on daminozide and UDMH, which showed the same tumor types as the newer Uniroyal studies, the Agency has classified both daminozide and UDMH as Group B_2 chemicals, probably human carcinogens.

54 Fed. Reg. 22,558, 22,564 (1989). Agency scientists discussed the carcinogenicity studies evaluated in determining both daminozide and UDMH to be B_2 carcinogens:

> Several carcinogenicity studies serve as the historical basis of concern about the carcinogenic potential of daminozide and UDMH. These studies . . . suggested that daminozide is oncogenic in laboratory rats and mice, and UDMH is oncogenic in laboratory mice and hamsters.[30]

In October 1989, Uniroyal asked the EPA to withdraw Alar's food-use registrations. 57 Fed. Reg. 46,436, 46,436 (1992).

Finally, on October 8, 1992, EPA issued a final notice concluding that "the dietary risk posed to the general

---

[30] CR 165, Ex. H, Farber Dep. Ex. 216 (EPA, *Daminozide Special Review Technical Support Document—Preliminary Determination to Cancel the Food Uses of Daminozide* II-1 (May 1989)) (*"Technical Support Doc."*); *Nader v. United States EPA*, 859 F.2d 747, 749 (9th Cir. 1988) ("[f]ive scientific studies conducted between 1973 and 1984 demonstrated with statistically significant results a correlation between ingestion of Alar and various types of tumors in certain lab animals"), *cert. denied*, 490 U.S. 1034 (1989). All these scientific studies are part of the District Court record. *See* CR 165, Ex. E, Rosen Dep. Exs. 137 (Toth, 1973), 138 (Toth, 1977a), 139 (Toth, 1977b); CR 165, Exs. N (NCI, 1978), DD (Haun, 1984).

population in 1989 was unreasonable" and adhered to its regulatory position on the food uses of daminozide. *Id.* at 46,438. Although Uniroyal disagreed with EPA's classification of daminozide, the Agency retained the B_2 classification. *Id.* at 46,440.

The Agency uses animal studies to generate a chemical's cancer potency factor (its so-called q^*),[31] which is combined with exposure data to determine cancer risk to humans. In 1992, three years after the CBS broadcast, EPA revised the UDMH cancer potency factor downward by a factor of two,[32] but it reaffirmed that the cancer risks to consumers posed by Alar were unreasonable and that the chemical should remain off the market.[33]

E. *A Comparison of NRDC and EPA Risk Assessments*

The NRDC's risk assessments in 1989 relied upon EPA's data, with some refinements. In *Intolerable Risk*, for example, NRDC calculated the lifetime carcinogenic risk from UDMH to be (24×10^{-5}) while EPA calculated the lifetime carcinogenic risk from UDMH to be (4.9×10^{-5}).[34] NRDC risk calculations were higher than EPA's calculations by about a factor of five for three reasons: (1) NRDC based its calculation on children's

---

[31] "A high q^* indicates a strong oncogenic response (more tumors) to the administered dose; a low number indicates a weak response." CR 165, Ex. E, Rosen Dep. Ex. 177 (NRC, *Regulating Pesticides in Food: The Delaney Paradox* 54 (1987)) (*"Delaney Paradox"*). EPA periodically complies q^*'s for all pesticides. *See* CR 165, Ex. D, Whelan Dep. Ex. 111 (Reto Engler, EPA Memo "List of Chemicals Evaluated for Carcinogenic Potential" (Oct. 14, 1992)) (*"Engler Memo"*).

[32] CR 165, Ex. C, Wilkinson Dep. Ex. 78 (*Statement by the U.S. Environmental Protection Agency on Alar* (Feb. 25, 1992)).

[33] *Id.*; *see also id.* (letter from Deputy Assistant Administrator, Office of Pesticides and Toxic Substances, EPA, stating that the change in potency value, or "q^*," did not change EPA's conclusion that "dietary risks from historical exposures are unacceptably high").

[34] *Cf.* NRDC, *Intolerable Risk*, at 139, *with* EPA, *Technical Support Doc.*, at II-41.

intake of pesticides for the first five years of life,[35] while EPA based its calculation on the average intake of pesticides over a lifetime;[36] (2) NRDC took into account the latency period of cancer and thus gave increased weight to early exposure,[37] while EPA weighted exposure at any age equally;[38] and (3) NRDC used the UDMH cancer potency factor EPA had used until 1989 ($q^* = 8.9$ (mg./kg/day)$^{-1}$), while EPA used a new UDMH q^* based on interim studies by Uniroyal (0.88 (mg/kg/day)$^{-1}$).[39]

As the CBS broadcast made clear, however, "both EPA and NRDC want[ed] Alar off the market, though they differ[ed] on the urgency of the problem . . . ."[40] Furthermore, the EPA and NRDC risk estimates were "not that far apart. [Even a] factor of 25 difference is well within the range of what two reasonable people, using similar data and reasonable assumptions, might come up with."[41]

---

[35] NRDC, *Intolerable Risk*, at 15. NRDC considered exposure during the first five years of life especially significant because, per unit body weight, young children ingest substantially more fruit than adults. *Id.* at 24. Four years later, the National Academy of Sciences ("NAS") confirmed the validity of this premise. *See* NRC, *Pesticides*, at 172, fig. 5-1. Particularly compelling is the NAS finding that one-year-old children consume more than 30 times more apple juice per day than adults. *Id.* at 351.

[36] EPA, *Technical Support Doc.*, at II-33.

[37] NRDC, *Intolerable Risk*, at 121. The validity of weighing early childhood exposure more heavily than adult exposure is also strongly supported by the NAS committee report. *See* NRC, *Pesticides*, at 354, table 8-2 (concluding that for foods that are more heavily consumed by children than adults, such as apple juice, a weighing factor as high as 3.74 is appropriate).

[38] EPA, *Technical Support Doc.*, at II-39-40.

[39] *Cf.* NRDC, *Intolerable Risk*, at 129, *with* EPA, *Technical Support Doc.*, at II-39.

[40] CR 165, Ex. F, Olson Dep. Ex. 170 (L. Roberts, *Alar: The Numbers Game*, 243 Science 1430, 1430 (1989)).

[41] *Id.*

F. *The Procedural History of the Lawsuit*

On November 28, 1990, eleven Washington apple growers filed a complaint in the Yakima County Superior Court of the State of Washington, claiming, *inter alia*, product disparagement and naming as defendants CBS, three CBS affiliates, the NRDC, and Fenton Communications, Inc. ("Fenton"), a public relations firm used by the NRDC in 1989.[42] The defendants removed the case to the United States District Court for the Eastern District of Washington on grounds of diversity of citizenship. CR 1. The CBS affiliate defendants were later dismissed. CR 104. Although the lawsuit was initially styled as a class action, petitioners never obtained certification of the purported class of 4,700 Washington apple growers. CR 51.

In January 1992, CBS moved to dismiss because the broadcast was not "of and concerning" any of the plaintiffs. CR 59-64, 100. The District Court refused to dismiss the claims against CBS,[43] but later dismissed the claims brought against NRDC and Fenton, holding that they had disparaged "at least the whole agricultural world." [44]

In July 1993, after extensive discovery on the allegations of falsity, including twelve expert witness depositions, CBS moved for summary judgment. CR 164-70, 180, 198. CBS argued that the plaintiffs had failed to prove "that the gist of the broadcast is demonstrably, verifiably false—not merely that they disagree with it, would have stated it differently, or wish that it had emphasized their particular point of view." CR 180 at 37.

CBS also argued that the plaintiffs had failed to meet their burden of proof even as to various individual state-

---

[42] CR 1, Ex. A.

[43] The court allowed petitioners' product disparagement claims to proceed against CBS even though it held that, were this a defamation action, no single grower could satisfy the "of and concerning" requirement. *Auvil I*, 800 F. Supp. at 933.

[44] *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 941, 944 (E.D. Wash. 1992) (*"Auvil II"*).

ments in the broadcast.[45] CR 180 at 61-70. Thus, because the plaintiffs had offered no evidence that Alar was *not* one of the "most potent" carcinogens added to the nation's food supply, the NRDC's statement regarding Alar as the "most potent" carcinogen was substantially true and not actionable under Washington law. *Id.* at 65-67.

Meanwhile, the plaintiffs cross-moved for partial summary judgment on the issue of falsity. CR 171, 173-77, 181. They offered an affidavit from Dr. David Frank, a Ph.D. in human rhetoric and communication who claimed that he knew what the "message" of the CBS broadcast was. According to Dr. Frank:

> The Message of the 60 Minutes story "A is for Apple" is that "scientific evidence demonstrates conclusively that apples are an immediate hazard to public health because they will cause cancer in children."

CR 192 (Frank Aff.) at 7. The plaintiffs filed other affidavits opposing CBS' motion for summary judgment. CR 184-93, 196-98. They did not respond to CBS' defense of various statements in the broadcast, however, asserting that the court must focus on the alleged "message" of the broadcast as developed by Dr. Frank. CR 206 at 4-5, 14.

Next, claiming that the EPA's conclusions about Alar were wrong and that scientists cannot rely on the results of animal tests to determine human cancer risks, the plaintiffs moved to strike the opinions of the CBS scientific expert witnesses.[46] CR 172. CBS opposed that motion. CR 182.

---

[45] Petitioners' statement to this Court that the Ninth Circuit affirmed the "grant of summary judgment on a ground never raised by CBS," Pet. at 23, is contradicted by the trial court record. *See* discussion, *infra*, at pages 21-25.

[46] The plaintiffs' motion to strike was based on this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).

The District Court denied the plaintiffs' motion to strike, finding that "at least to the extent CBS' experts relied on the data and conclusions provided by the EPA, their conclusions are clearly sufficiently reliable for this inquiry."[47] The court also denied the plaintiffs' cross-motion for partial summary judgment.[48]

In analyzing CBS' summary judgment motion, the court divided the broadcast into three component statements: (1) daminozide is the most potent cancer-causing agent in the food supply; (2) daminozide poses an imminent hazard and an unacceptable risk; and (3) daminozide is most harmful to children. *Auvil III*, 836 F. Supp. at 742. Faced with the overwhelming EPA evidence of cancer risk and the failure to offer any evidence of Alar's safety by petitioners and their experts,[49] the District Court concluded that none of the statements "can be proven as false." *Auvil III*, 836 F. Supp. at 742. Accordingly, the court entered summary judgment in favor of CBS. *Id.* at 741-43.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit.[50] On October 2, 1995, the court affirmed the District Court's judgment.[51] In its opinion, the Ninth Circuit noted that the CBS broadcast had included "a number of viewpoints on the Alar issue"

---

[47] *Auvil v. CBS "60 Minutes"*, 836 F. Supp. 740, 741 (E.D. Wash. 1993) (*"Auvil III"*).

[48] *Id.* at 741.

[49] When asked for proof of Alar's alleged safety, petitioners' experts conceded that they could not prove this. *E.g.*, CR 165, Ex. F (Olson Dep. Tr. at 226-28), Ex. C (Wilkinson Dep. Tr. at 284), Ex. D (Whelan Dep. Tr. at 121).

[50] On appeal, petitioners did not challenge the District Court's denial of their motion to strike and dropped any arguments based on *Daubert*. *See* Appellants' Brief (no citation to *Daubert*); Appellants' Reply Brief (same); Appellants' Petition for Rehearing (same).

[51] *Auvil v. CBS "60 Minutes"*, 67 F.3d 816 (9th Cir. 1995).

and held that petitioners' argument, which consisted of a claim that "no studies have been conducted to test the relationship between ingestion of daminozide and incidence of cancer in *humans*" and a "claim that animal studies cannot be relied on to indicate cancer risk for humans," was "insufficient to show a genuine issue for trial regarding the broadcast's assertions that daminozide is a potent carcinogen," given that EPA's "[a]nimal laboratory tests are a legitimate means for assessing cancer risks to humans." [52]

The Court of Appeals also held that because they had not presented any evidence that contradicted the NRDC's findings that children "ingest more apple products per unit of body weight than do adults," petitioners had failed to "create a genuine issue as to the falsity of the broadcast's assertion that daminozide is more harmful to children." [53] Finally, the court concluded that petitioners' "attempt to derive a specific, implied message from the broadcast as a whole and to prove the falsity of that overall *message* is unprecedented and inconsistent with Washington law." [54] The court denied the petition for rehearing on October 27, 1995.[55] Pet. at 17a-18a.

---

[52] 67 F.3d at 818, 821 (emphasis in original).

[53] *Id.* at 821-22.

[54] *Id.* at 822 (emphasis in original). Because of its ruling on the falsity issue, the court did not consider another ground argued by CBS for affirmance—the fact that petitioners' claims did not satisfy the "of and concerning" requirements of the First Amendment and Washington State law. *Id.* at 819 n.4; *see* Brief of Appellee CBS Inc. at 14-22. The "of and concerning" rule provides an independent basis for affirming the judgment below. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

[55] Justice Sandra Day O'Connor granted petitioners' application to extend the deadline for filing their petition for certiorari up to and including February 26, 1996.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10.1 states that "a petition for a writ of certiorari will be granted only where there are special and important reasons therefor." Petitioners suggest, variously, that the decision below is inconsistent with decisions from other circuits or with those of this Court, that the Ninth Circuit "badly fumbled" the case, and that the Court should provide "guidance" for other lawsuits. *See* Pet. at 13-30. None of these assertions, however, is supported by the record or justifies a grant of certiorari under Rule 10.1. The Court should deny the Petition.

I. BECAUSE PETITIONERS DID NOT PRESS THEIR OBJECTION TO CBS' SCIENTIFIC EVIDENCE IN THE COURT OF APPEALS AND THAT COURT NEVER PASSED UPON THAT ISSUE, THIS IS NOT AN APPROPRIATE CASE FOR CLARIFYING *DAUBERT v. MERRELL DOW PHARMACEUTICALS*

Petitioners urge this Court to accept review of this case to correct the Ninth Circuit's "badly fumbled" efforts to deal with "issues of causation in the scientific context" because the decision is "directly at odds" with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), which articulated standards for "judicial evaluation of scientific methodology." Pet. at 13. They assert that the Ninth Circuit arrogated to itself the "role of arbiter of scientific questions" in ruling that the animal test data offered by CBS constituted valid evidence of carcinogenicity because it was a "legitimate means for assessing cancer risks to humans." *Id.* at 16. Petitioners' revived interest in this issue is surprising, given their failure to pursue it in the Ninth Circuit.

In July 1993, petitioners moved in the District Court to strike the opinions of CBS' scientific experts, who had offered human cancer risk assessments of Alar based upon their review and analysis of the EPA's evidence that Alar is a "probable human carcinogen," as well as their review of animal bioassay data. In moving to strike, petitioners

relied squarely on *Daubert* and argued that these expert opinions were inadmissible because, *inter alia*, they were "not peer-reviewed," and "reflect[ed] no methodology for quantitative assessment of actual risk, generally accepted by experts in the relevant fields of medicine, toxicology and biostatistics." CR 172 at 2. (Notably, petitioners did not move to strike any of the underlying EPA data, which were admitted without objection.)

In refusing to strike this evidence, the District Court understood *Daubert* as rejecting the then-prevailing judicial view that "expert opinion is only admissible if it is based on a technique or methodology that is generally acceptable by the scientific community." *Auvil III*, 836 F. Supp. at 741. The court noted that the "thrust" of *Daubert* was to "move away" from the focus of "general acceptance, as gauged by publication and the decisions of other courts" and to focus on whether an "expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* Accordingly, having concluded that "[a]nimal laboratory tests are a legitimate means for assessing cancer risk to humans," [56] the District Court found CBS' evidence to be relevant, and, "at least to the extent CBS' experts relied on the data and conclusions provided by EPA," reliable. *Auvil III*, 836 F. Supp. at 741.

Although petitioners now urge this Court to "provide guidance to the lower federal courts on complex scientific causation issues," their passion for this question [57] was

---

[56] There is no epidemiological data on Alar. CR 193 (Olson Aff.) at 12. Thus, petitioners misrepresent the record when they state that the Ninth Circuit ignored evidence that "all epidemiological studies have shown an absence of any link between Alar/UDMH and cancer in humans." *See* Pet. at 15; *see also* discussion, *infra*, at page 20, n.67.

[57] Petitioners cite a recent study by a panel of the NAS, which discussed the risks from natural and synthetic chemicals in our food supply. Pet. at 18. It has long been settled that matters that are outside the record will not be considered by the Court. *E.g., Schley v. Pullman's Palace Car Co.*, 120 U.S. 575 (1887).

noticeably absent from their Ninth Circuit submissions. In their Ninth Circuit appeal, petitioners did not pursue the argument that this evidence should have been excluded, and indeed did not even cite *Daubert*.[58] Given the total absence of any argument on this point, the Ninth Circuit did not discuss *Daubert* or explicitly engage in any *Daubert*-type analysis. For this reason alone, this is not an appropriate case for clarifying or defining the scope of *Daubert*.[59]

Alternatively, even if the Ninth Circuit actually had ruled on this issue, there is no reason for this Court to revisit *Daubert*. The "only challenge" to the admissibility of CBS' scientific evidence was petitioners' "claim that animal studies cannot be relied upon to indicate cancer risk for humans." 67 F.3d at 821. But, as the Ninth Circuit concluded, "[a]nimal laboratory tests are a legitimate means for assessing cancer risk to humans," *id.*, a conclusion which does not "so far depart from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision" and certainly does not create any conflict in the circuits. *See* S. Ct. R. 10.1(a), (c). Despite petitioners' repeated criticism of reliance on the results of animal bioassay data to predict human cancer risk (*see, e.g.*, Pet. at 16-19),

---

[58] *See* Appellants' Brief (no citation to *Daubert*); Appellants' Reply Brief (same); Appellants' Petition for Rehearing (same).

[59] *See, e.g., Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991) (holding that the Court will not review an issue that was neither pressed nor passed upon by the court below); *see also* S. Ct. R. 10.1(c) (considerations that govern review on writ of certiorari include when a "United States court of appeals has *decided* an important question of federal law . . . or has *decided* a federal question in a way that conflicts with applicable decisions of this court") (emphasis added); *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (refusing to entertain argument omitted from appellants' brief because the "'premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them'") (*quoting Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

the District Court's and the Ninth Circuit's decisions were on solid ground under *Daubert*,[60] given that the record established that such data are regularly accepted as valid predictors of human health risk by federal statutory law,[61] the EPA,[62] the World Health Organization's International Agency for Research on Cancer ("IARC"),[63] the NAS,[64]

---

[60] The District Court's decision on admissibility of evidence is reviewable for abuse of discretion. *See, e.g., United States v. Abel*, 469 U.S. 45, 54 (1984).

[61] *See, e.g.*, Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 348(c)(3)(A) ("no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal"); TSCA, 15 U.S.C. §§ 2601-29, especially § 2603(b)(2)(A) (in prescribing "standards for the development of test data. . . . [t]he methodologies that may be prescribed . . . include epidemiologic studies, serial or hierarchical tests, in vitro tests, and whole animal tests").

[62] *See* 40 C.F.R. § 154.7(a)(2)(i) (EPA action may be based on "[e]ffects demonstrated in humans or experimental animals"); Final Guidelines for Developmental Toxicity Risk Assessment, 56 Fed. Reg. 63,798, 63,799 (1991) ("[h]azard identification/dose-response evaluation involves examining all available experimental animal and human data").

[63] IARC has determined that the daminozide tests that petitioners criticize are "sufficient evidence of carcinogenicity" in animals. *See* CR 165, Ex. G, Hoel Dep. Ex. 199 (IARC, *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans* at 30, 44, 62 (7th Supp. 1987)) ("*Monographs*"). According to petitioners' expert Dr. Olson, the *Monographs* are an "authoritative source of information on the carcinogenicity of chemicals." CR 193 (Olson Aff.) at 10. As IARC has stated, "[i]n the absence of adequate data on humans, it is biologically plausible and prudent to regard agents for which there is sufficient evidence of carcinogenicity in experimental animals as if they presented a carcinogenic risk to humans." IARC, *Monographs*, at 30.

[64] Long-term animal bioassays are "commonly used as a basis for making qualitative inferences about the likelihood that an agent poses a carcinogenic hazard for humans." NRC, *Issues in Risk Assessment*, 15 (1993) ("*Issues*"); *id.* at 33 ("assumptions about relationships between animal and human data have proved fairly reliable"); *id.* at 44 ("For the few chemicals on which data exist, potency estimates calculated from animal data have been reported to be highly correlated with similar estimates made from

scientific publications,[65] and American scientists.[66] Using animal data to predict human cancers, moreover, is prac-

---

human data . . . ."); *see also* CR 165, Ex. Q (NRC, *Risk Assessment in the Federal Government: Managing the Process* (1983)).

[65] *See, e.g.*, B. Sedgwick, *Oxidation of Methylhydrazines to Mutagenic Methylating Derivatives and Inducers of the Adaptive Response of E. coli to Alkylation Damage*, 52 Cancer Res. 3693, 3693 (1992) (UDMH "known to be carcinogenic in rodents"); CR 165, Ex. G, Hoel Dep. Ex. 203 (E. Crouch & R. Wilson, *Interspecies Comparison of Carcinogenic Potency*, 5 J. Toxicology & Envtl. Health 1095 (1979)); CR 165, Ex. G, Hoel Dep. Ex. 204 (H. Guess et al., *Uncertainty Estimates for Low-Dose-Rate Extrapolations of Animal Carcinogenicity Data*, 37 Cancer Res. 3475 (1977)); L. Tollefson et al., *Comparison of the Cancer Risk of Methylene Chloride Predicted from Animal Bioassay Data with the Epidemiologic Evid.*, 10 Risk Analysis 429, 429 (1990) (negative epidemiological data on methylene chloride insufficient "to show that the risk is inconsistent with the human risk estimated by modeling the rodent bioassay data").

[66] *See, e.g., New York Response, supra;* CR 165, Ex. X (*Health Effects of Pesticide Use On Children: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor & Human Resources*, 101st Cong., 1st Sess. 32 (1989)) (statement of Dr. Prothrow-Stith, Mass. Dept. of Public Health) ("sufficient scientific evidence" exists to support the "efficacy" of the UDMH animal studies and "[s]ome of the criticized protocol are in fact generally accepted procedures in the scientific community"); CR 165, Ex. G, Hoel Dep. Ex. 202 (L.S. Gold et al., *Rodent Carcinogens: Setting Priorities*, 258 Science 261 (1992)) ("*Rodent Carcinogens*") (relying on rodent data to predict risk to humans); CR 165, Ex. E, Rosen Dep. Ex. 181 (F. Perera & P. Boffetta, *Perspectives on Comparing Risks of Environmental Carcinogens*, 80 J. Nat'l Cancer Inst. 1282, 1283 (1988)) ("in a number of cases, risks observed in humans have been consistent with those calculated from high-dose animal experiments"); CR 165, Ex. C, Wilkinson Dep. Ex. 51 at 69 (both epidemiological data and animal data are used to evaluate human risks); CR 187, Jonsson Aff., Ex. 14 at 3, 4 (Drs. Lijinsky and Ames state, respectively, that there is "no question that Alar either is a carcinogen or it produces a carcinogen," UDMH, and that daminozide/UDMH "is clearly coming out as a carcinogen"). As the American Chemical Society has noted, animal studies are "the best predictors we have." CR 165, Ex. B, Slovic Dep. Ex. 31 at 229; *see also* Chemical Carcinogens: Review of the Science and Its Associated Prin-

tically necessary and ethically correct.[67] Federal courts have regularly accepted such data.[68]

At bottom, petitioners ask this Court to review a highly fact-specific evidentiary ruling on the role of animal bioassay data in human cancer risk assessment.[69] For

---

ciples, 50 Fed. Reg. 10,372 (1985) (Office of Science and Technology Policy, Exec. Office of the President, adopting IARC position on propriety of relying on animal data).

[67] On a practical level, epidemiological methods are insensitive carcinogen detectors and have "great difficulty in demonstrating causality." NRC, *Issues*, at 47; *cf.* CR 165, Ex. C (Wilkinson Dep. Tr. at 72) ("the chronic health effects of chemicals cannot be verified by direct experimentation"). "Epidemiological studies are inherently capable of detecting only comparatively large increases in the relative risk . . . . Negative results cannot prove the absence of [risk] . . . ." EPA Final Guidelines for Carcinogen Risk Assessment, 51 Fed. Reg. 33,992, 33,995-96 (1986). On an ethical level, ignoring animal studies subjects human populations to avoidable risks of potentially catastrophic magnitude. *See Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799, 801 n.4 (D.D.C. 1986) (testing on humans could not lawfully or ethically be conducted), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989); CR 165, Ex. B (Slovic Dep. Tr. at 170-71) ("not acceptable" to "treat people as guinea pigs for studying chemical risks").

[68] *See, e.g., Environmental Def. Fund, Inc.* v. *EPA*, 548 F.2d 998, 1006 (D.C. Cir. 1976) (approving EPA's decision to "accept the use of animal test data to evaluate human cancer risks [and] consider a positive oncogenic effect in test animals as sufficient to characterize a pesticide as posing a cancer risk to man"), *cert. denied*, 431 U.S. 925 (1977); *Int'l Fabricare Inst. v. United States EPA*, 972 F.2d 384, 390 (D.C. Cir. 1992) (rejecting objections to EPA's risk assessment as "the opinions of a few scientists . . . at odds with what is 'generally thought' about the subject"); *Villari v. Terminix Intern., Inc.*, 692 F. Supp. 568, 570 (E.D. Pa. 1988) ("animal studies are routinely relied upon by the scientific community in assessing the carcinogenic effects of chemicals on humans").

[69] This was not a case about the use of scientific data to "determine whether particular chemicals are the cause of various injuries." Pet. at 20. This lawsuit concerned risk assessment—the "process by which scientific data are analyzed to describe the form, dimension, and characteristics of risk—that is, the likelihood of

the reasons discussed above, the Ninth Circuit's holding that animal test data are an accurate predictor of human cancer risk is a wholly unremarkable conclusion that fully comports with all relevant statutory and regulatory regimes and with the views of other courts.[70]

II. THE NINTH CIRCUIT DID NOT COMMIT ANY PROCEDURAL ERROR BY AFFIRMING SUMMARY JUDGMENT ON A GROUND THAT WAS SUPPORTED IN THE RECORD AND HAD BEEN ARGUED BY CBS, BUT ON WHICH PETITIONERS APPARENTLY HAD NOT FOCUSED THEIR ATTENTION

Petitioners assert that this case implicates an issue that has divided the circuits—*i.e.*, "what is the initial burden of production imposed by Rule 56 on a party moving for summary judgment." Pet. at 22. Although couched

---

harm to humans or the environment." CR 165, Ex. FF (D. Patton, *The ABCs of Risk Assessment*, 19 E.P.A. J. 10, 11 (1993)). As a predictive science that is based on a "likelihood of harm" analysis, risk assessment does not determine whether any particular chemicals "are the cause of" any particular injuries because, as petitioners' expert Dr. Slovic conceded, "the notion of uncertainty is inherent in risk. If there's no uncertainty, there's no risk." CR 165, Ex. B (Slovic Dep. Tr. at 48). Thus, the debate over Alar's risks was a "political dispute." M. Curtis, *Monkey Trials: Science, Defamation, and the Supression of Dissent*, 4 Wm. & Mary Bill of Rights J. 507, 588 n.411 (1995).

[70] Nor did the District Court improperly weigh the evidence. Though they bore the burden of proof, petitioners devoted themselves to shadowboxing with an irrelevancy—the falsity of Dr. Frank's version of the broadcast's "message." *See, e.g.*, CR 191 (Wilkinson Aff.) at 6 ("My testimony discusses the falsity of that message."); CR 193 (Olson Aff.) at 7-8 (opinion also premised on Dr. Frank's "message"). The decision thus reflects the basic rule that "disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); *see also Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (summary judgment "opponent must do more than simply show there is some metaphysical doubt as to the material facts").

as a broad attack on the manner in which federal courts have applied Rule 56 of the Federal Rules of Civil Procedure and this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), petitioners' argument is really that the Ninth Circuit erred because it allegedly affirmed CBS' summary judgment "on a ground never raised by CBS." [71] The court's decision, however, involved no such error—and the suggestion of a due process violation is without support.

In July 1993, at the District Court's direction, the parties simultaneously filed motions for summary judgment. In its motion, CBS principally argued that the (1) central message of the 60 MINUTES report was not verifiably false; and (2) even if it were objectively verifiable, the message was not false. CR 180 at 35, 53. CBS also argued that individual components of the message—including the NRDC statement about Alar's potency—were either substantially true or were not verifiably false. *Id.* at 65-69. When petitioners moved for partial summary judgment, they asserted that the overall message was false and they disputed CBS' characterization of that message.[72]

In reply, CBS asserted that individual statements in the broadcast were substantially true. CR 198 at 30-36. In accordance with the requirements articulated by this Court in the *Celotex* case,[73] CBS also identified those portions

---

[71] Pet. at 23. Of course, under well-established case law, the Court of Appeals could affirm the grant of summary judgment on any basis that appeared in the record. *E.g., Mitchell v. Collagen Corp.*, 67 F.3d 1268, 1285 (7th Cir. 1995); *Jones v. Unisys Corp.*, 54 F.3d 624, 627-28 (10th Cir. 1995); *McKenzie v. General Tel. Co. of California*, 41 F.3d 1310, 1316 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1697 (1995).

[72] *See* CR 171-77. These motions were filed after extensive discovery on the issue of falsity, which included document discovery and depositions of twelve scientific experts, including experts in the field of risk assessment, toxicology, biostatistics, and pediatric medicine. *See* CR 180 at 9-11.

[73] In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this Court articulated the burden of production that rests on a party seeking

of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," Fed. R. Civ. P. 56(c), that demonstrated the absence of a genuine issue of material fact on the issue of falsity. For example, CBS submitted its First Amended Answers to Plaintiffs' Fourth Interrogatories, which provided extensive documentary support for each of the allegedly false statements. *See* CR 166 (Pesce Aff.) Ex. A; CR 198 at 30. In demonstrating the substantial truth of the statement that Alar was the "most potent" cancer-causing agent in the food supply, CBS referred petitioners to the EPA memoranda and reports, testimony before various Congressional committees, and bioassay data that supported that statement. CR 166 (Pesce Aff.) Ex. A at 5-46.

When petitioners filed their sur-reply to CBS' summary judgment motion, they acknowledged that CBS had devoted "10 pages" in its reply brief discussing the truth of "isolated" statements in the broadcast, but they apparently believed that CBS' approach was misguided and predicated their entire case on their theory that the District Court's "falsity" analysis must be on their version of the overall "message" of the broadcast. CR 206 at 4-5, 14.[74] As a result, petitioners devoted very little, if any, discussion in the District Court to the alleged falsity of individual statements in the broadcast.

On appeal, petitioners again focused on the claimed falsity of their own rendering of an alleged message con-

---

summary judgment under Fed. R. Civ. P. 56. As the Court explained, "[a] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any,' which it believes demonstrate the absence of a genuine issue of material fact." 477 U.S. at 323.

[74] As a result, petitioners' submissions in the District Court failed to respond to the documentary evidence adduced by CBS on the issue of the substantial truth of individual statements in the broadcast.

veyed by the 60 MINUTES broadcast. Indeed, their statement of the issue presented for the Ninth Circuit's review was framed as:

> Could a reasonable jury accept Plaintiffs' interpretation of CBS' broadcast message and find that Plaintiffs met their burden of proving that message false?

Appellants' Brief at 2.[75] Petitioners now readily concede that they "devoted a major portion of their argument to attempting to demonstrate what the overall message of the broadcast was." Pet. at 24.

Although the Ninth Circuit ultimately rejected petitioners' efforts to defeat summary judgment by relying on an implied, overall false "message"—stating that the inquiry must be whether or not individual statements in the 60 MINUTES broadcast were false[76]—this case is not akin to *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208 (1986). In *McBride*, the trial court granted summary judgment *sua sponte* on a ground not raised by the moving party.[77] Here, of course, petitioners

---

[75] CBS argued in opposition to the appeal that individual statements were substantially true. Brief of Appellee CBS Inc. at 32-35. Petitioners' reply in the Ninth Circuit, however, was limited to an exegesis of the "false" message extracted by Dr. Frank. Appellants' Reply Brief at 11-20.

[76] The Ninth Circuit explained that a contrary approach would "raise[] the spectre of a chilling effect."

> Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability.

67 F.3d at 822.

[77] In reversing that order, the court held that

> [Plaintiff] McBride was not on notice that he was obliged to marshall all evidence to establish a triable issue over the defendants' actual malice or face summary judgment. Having been afforded no opportunity for discovery into the . . . defendants' state of mind [*i.e.*, actual malice] McBride could

were fully on notice that CBS was relying on the argument that individual statements in the broadcast were substantially true. They simply chose not to respond to that issue either in the District Court or in the Ninth Circuit, devoting their resources to tilting at Dr. Frank's windmill. They cannot ask this Court to grant certiorari to remedy that self-created problem.

III. THE DECISION BELOW DID NOT DECIDE ANY FIRST AMENDMENT QUESTION RELATING TO "LITERALLY TRUE STATEMENTS WITH DEFAMATORY IMPLICATIONS" AND, MOREOVER, WAS A STATE LAW RULING THAT DOES NOT CONFLICT WITH ANY FEDERAL APPELLATE DECISION

Petitioners ask the Court to grant review to resolve an "important First Amendment issue" that they claim has divided the various federal appeals courts—"whether the First Amendment protects speakers from liability for statements which, although literally true, have false and defamatory implications." Pet. at 26. This question, however, was neither pressed by the parties nor passed upon by the courts below. Petitioners, moreover, are challenging a decision grounded entirely on state law.

First, the premise that underlies petitioners' argument is simply wrong: CBS never argued—and did not need to argue—that every statement in the broadcast was "literally true." Pet. at 26. Rather, CBS asserted that the individual statements were not actionable because they were substantially true. CR 180 at 35-37; Brief of Appellee CBS Inc. at 32-35.

More importantly, this "substantial truth" argument was based on applicable state law.[78] For example, peti-

---

hardly have anticipated that the time had come to put up or shut up with evidence of defendants' actual malice.

800 F.2d at 1212.

[78] As CBS noted: "A statement that is substantially true—even if technically in error—cannot support liability for defamation

tioners attacked the NRDC statement calling Alar the "most potent cancer-causing chemical in our food supply" and claimed that at least one naturally-occurring chemical (aflatoxin) might have a higher toxicological potency number than UDMH,[79] but CBS showed that, even if UDMH was not, technically, the "most potent" carcinogen in existence, it made Alar one of the "most potent" carcinogens added to the food supply.[80] Under Wash-

---

under Washington law." Brief of Appellee CBS Inc. at 32. Under Washington law, a defamation plaintiff cannot prevail merely by pointing to minor inaccuracies in a broadcast that do not alter the "gist or substance of the report when considered as a whole." *Herron v. KING Broadcasting Co.*, 112 Wash. 2d 762, 769, 776 P.2d 98, 102 (1989); *see also Mark v. Seattle Times Co.*, 96 Wash. 2d 473, 493, 635 P.2d 1081, 1092 (1981) (defamation law demands an inquiry into substantial truth), *cert. denied*, 457 U.S. 1124 (1982). As the Washington Supreme Court explained in *Herron*, an allegedly false statement "affects the 'sting' of a report only when 'significantly greater opprobrum' results." 112 Wash. 2d at 769, 776 P.2d at 102.

[79] The District Court (in a ruling that petitioners did not challenge on appeal) held that this statement was not actionable because it "was directed to EPA inaction, not apples." *Auvil II*, 800 F. Supp. at 944. In addition, whether aflatoxin is more potent than UDMH is debatable. *See, e.g.*, CR 165, Ex. I, Finkel Dep. Ex. 219 (A. Finkel, *Towards Less Overconfident Comparisons of Uncertain Risks: The Case of Aflatoxin and Alar* (May 1993 Draft)).

[80] EPA's potency, or q^* value, for UDMH changed over time. In 1989 EPA revised the q^* down to 8.8×10^{-1} (or 0.88). In 1991 EPA revised it to 4.6×10^{-1} (or 0.46). *See* Attachment to *Engler Memo, supra*, at 7. Using similar data, California officials have concluded that the q^* for UDMH was 2.8, which was even higher than EPA's calculation. *See* CR 165, Ex. G, Hoel Dep. Ex. 210 (Cal. Env. Prot. Agency, *Risk-Specific Intake Level for Proposition 65 Carcinogen 1,1-Dimetheylhydrazine (UDMH)* (1992). Using California's q^* UDMH would be more potent than any other pesticide. *See* NRC, *Delaney Paradox*, at 55. As recently as 1992, Dr. Bruce Ames, relied upon by petitioners' experts, ranked EDB, DDT, DDE, and UDMH as the four most potent synthetic pesticides. *See* L.S. Gold et al., *Rodent Carcinogens*, 258 Science at 262-64. Of those, only UDMH was on the market in 1989. *Id.* at 264, table 3;

ington's *Mark* rule, this statement was not actionable.[81]

Because it was never raised in, or decided by, the courts below, petitioners' First Amendment question is not presented by this case.[82] CBS relied on state substantive law, not on the First Amendment, when it argued that the broadcast itself—not Dr. Frank's attempt to torture a latent, false "message" from the broadcast—was the best (and indeed only) evidence of what the broadcast actually said.[83] Also, the Ninth Circuit relied on Washington law in holding that liability may not be based on the hidden "message" divined by Dr. Frank and that petitioners' claims must rise or fall on "the statements themselves," rather than on some "implied, disparaging

---

see also 37 Fed. Reg. 13,369 (1972) (cancellation of DDT and DDE); 48 Fed. Reg. 46,234 (1983) (cancellation of EDB).

[81] *See Mark*, 96 Wash. 2d at 496, 635 P.2d at 1093; *Auvil III*, 836 F. Supp. at 742 (noting undisputed evidence that "UDMH ranked as one of the most if not the most carcinogenic synthetic pesticide then on the market").

[82] *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("ordinarily, this Court does not decide questions not raised or involved in the lower court"); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but "not raised in Court of Appeals . . . is not properly before us").

[83] *See, e.g.*, CR 198 at 12 n.23 (" 'The defamatory meaning must be certain and apparent' from the broadcast itself and '[a] court is bound to invest words with their natural and obvious meaning, and may not extend language by innuendo or by the conclusions of the pleader.' ") (*quoting Sims v. KIRO, Inc.*, 20 Wash. App. 229, 234, 580 P.2d 642, 645, *rev. denied*, 91 Wash. 2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979)); CR 198 at 14 ("Ambiguities are not to be resolved in favor of a defamatory or disparaging meaning.") (*citing Lee v. The Columbian, Inc.*, 64 Wash. App. 534, 538, 826 P.2d 217, 220 (1991); *Exner v. American Medical Ass'n*, 12 Wash. App. 215, 217-18, 529 P.2d 863, 866 (1974)). CBS held to that position on appeal, relying on Washington State substantive law, not on the First Amendment. *See* Brief of Appellee CBS Inc. at 24-25.

message." [84] Petitioners have not identified any part of the Ninth Circuit's opinion—which is otherwise based completely on Washington law and general tort policy grounds—which suggests that the decision turns upon an interpretation of the First Amendment.[85] Its state law ruling is not appropriate for review by this Court.[86]

None of the cases cited by petitioners (Pet. at 28-29) suggests a conflict over any question of federal law. *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), applied "District of Columbia defamation law" and the court's "understanding of the law of defamation by implication," not the First Amendment. *Id.* at 518-19.[87] Similarly, in *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993), the court cited Virginia law

---

[84] 67 F.3d at 822 (*citing Lee*, 64 Wash. App. at 538, 826 P.2d at 220). *Lee* in turn relied on *Sims*, 20 Wash. App. at 234, 580 P.2d at 645.

[85] Petitioners try to cure this problem by adding two critical words ("First Amendment") that were not used by the court below. "The court held that a contrary rule would 'raise[] the spectre of a chilling effect' (App. 15a) on *First Amendment speech rights*. . . ." Pet. at 26-27 (emphasis added). The Ninth Circuit said merely that such "uncertainty raises the spectre of a chilling effect on speech." 67 F.3d at 822.

[86] Petitioners, of course, disagree with this state law holding. *See* Pet. at 27 n.18. Citing earlier cases such as *Taskett v. KING Broadcasting Co.*, 86 Wash. 2d 439, 445, 546 P.2d 81, 85 (1976), they contend that prior "Washington Supreme Court case law makes clear that Washington *does* permit libel plaintiffs to recover for false implications arising from literally-true statements." Pet. at 27 n.18 (emphasis in original). In fact, as the *Lee* court ruled, *Taskett* does not stand for that proposition. *See Lee*, 64 Wash. App. at 538 n.3, 826 P.2d at 220 n.3. More to the point, this issue of state law, whether or not rightly decided by *Lee* and *Sims*, is not a matter for resolution by this Court. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1963).

[87] Indeed, the *White* decision, which dealt simply with whether "a challenged statement" or "a statement," *id.* at 518, is capable of defamatory meaning, did not consider whether to permit a cause of action based upon an implied "overall message" that might be false and defamatory.

for the proposition that "[a] defamatory implication must be present in the plain and natural meaning of the words used." *Id.* at 1092 (*citing Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588, 591-92 (1954)).[88] *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985), *reheard on other grounds*, 788 F.2d 1300 (8th Cir.) (*en banc*), *cert. denied*, 479 U.S. 883 (1986), relied on South Dakota law when it stated that "the law does not recognize libel by omission as a tort," adding that its rejection of libel-by-omission was "grounded on our reading of the definition of libel." *Id.* at 648.[89] Petitioners' suggestion of a conflict with *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), is also unsupported by the record.[90]

---

[88] The court's view of Virginia law, moreover, did not differ from the Ninth Circuit's application of Washington law:

> The falsity of a statement and the defamatory "sting" of the publication must coincide—that is, where the alleged defamatory "sting" arises from substantially true facts, the plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel.

Chapin, 993 F.2d at 1092 (*citing AIDS Counseling and Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990)). To the extent the *Chapin* decision touched upon First Amendment issues at all, its analysis was not inconsistent with the result in this case. *See Chapin*, 993 F.2d at 1092 n.6 (" 'Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.' ") (*quoting Garrison v. Louisiana*, 379 U.S. 64, 74 (1965)).

[89] Although the Eighth Circuit also recognized that its conclusion "has strong underpinnings in the First Amendment," its decision in no way conflicts with the result in the Ninth Circuit, which also found libel by implication claims not actionable. *Id.* Indeed, the *Janklow* court agreed with the court below when it ruled that there is no basis for liability where a publication is not susceptible to the meaning that the plaintiff seeks to attach to it. *Id.* at 649.

[90] In *Milkovich*, the Court held that the First Amendment did not create a "wholesale defamation exemption for anything that might be labeled 'opinion.' " *Id.* at 18. *Milkovich* involved implications arising from specified "statements" by the defendant that

CONCLUSION

For the foregoing reasons, CBS respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

BRUCE E. H. JOHNSON *
P. CAMERON DEVORE
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 628-7683

SUSANNA M. LOWY
ANTHONY M. BONGIORNO
CBS Inc.
51 West 52nd Street
New York, New York 10019
(212) 975-8758
Counsel for Respondents

Dated: March 28, 1996

* Counsel of Record

---

were apparently actionable under Ohio law and did not address the situation presented here—*i.e.*, allegations of an implied "overall message" where the "statements" themselves are substantially true and where applicable state law rejects implied libel theories. Finally, *Milkovich* stated that, in these circumstances, "a statement on matters of public concern must be provable as false before there can be liability" under state law. *Id.* at 20 (*citing Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)). The decision below is completely consistent with that rule. *See, e.g., Auvil III*, 836 F. Supp. at 742-43 (applying *Hepps* holding).